New Hampshire
OFFICE OF ATTORNEY-GENERAL

COPY in 410

S-53

1953

Feb. 24

Honorable James C. Cleveland
Chairman, Senate Judiciary Committee
Concord, New Hampshire

Dear Senator:

At the direction of the Senate Judiciary Committee you have inquired whether Senate Bill No. 8, relative to discrimination in places of public accommodation, resort, or amusement, is constitutional. Please be advised it is my opinion, subject to suggested amendments under its severability clause as outlined herein, that the bill is constitutional.

Legislation of this type, which is more commonly known in our law as a Civil Rights Act, insofar as it deals with subjects not involved in interstate commerce, has been held a proper matter for state legislation.

Civil Rights Cases, 109 U.S. 3 (1883)

See: 39 Col. L. Rev. 986, 996 (1939)
44 Ill. L. Rev. 363 (1950)

Except as to innkeepers, common carriers and public utilities, civil rights acts, being in derogation of the common law, will be strictly construed by the courts. At common law, businessmen engaged in enterprises other than the aforementioned, were allowed to impose such reasonable restrictions and regulations as they felt would best serve the interests of their respective businesses.

However, under the police power available to the State under the Due Process Clause (14th Amendment) of the federal Constitution, civil rights legislation is held to be a proper exercise of

state police power. The Supreme Court has said in Western Turf Assoc. v. Greenberg, 204 U.S. 359, 363 (1906):

> "Decisions of this Court, familiar to all, and which need not be cited, recognize the possession, by each state, of powers never surrendered to the general government; which powers the state, except as restrained by its own Constitution or the Constitution of the United States, may exert not only for the public health, the public morals, and the public safety, but for the general or common good, for the well-being, comfort, and good order of the people. The enactments of a state, when exerting its power for such purposes, must be respected by this court, if they do not violate rights granted or secured by the supreme law of the land. . . ."

It has been urged in many cases that such legislation denies equal protection of the laws to the private businesses affected. This has uniformly been held a constitutional invasion of private rights in the exercise of the police power although in none of these cases has a statute with penalties as stringent as Senate Bill No. 8 been involved.

Bayliss v. Curry, 128 Ill. 287, 21 N.E. 595 (1889)
Pickett v. Kudran, 323 Ill. 138, 153 N.E. 667 (1926)
Bolden v. Grand Rapid Operating Corp., 239 Mich. 318, 214 N.W. 241 (1927)
Donnell v. State, 48 Miss. 661 (1873)
People v. King, 110 N.Y. 418, 18 N.E. 245 (1888)
Joynes v. Moore Co., 152 App. Div. 266, 136 N.Y. Supp. 578 (1912)

See: State v. Old Tavern Farm, Inc., 133 Maine 468 (1935)
In re: Stanley, 133 Maine 91 (1934)
Jordan v. Gaines, 136 Maine 291 (1939)

Cf: 449 Ill. L. Rev. 363 (1950)

COPY

The Supreme Court of this State has held that the Due Process Clause of the 14th Amendment to the federal Constitution was not designed to interfere with the exercise of police power in this state for the protection of the lives, liberty and property of its citizens or for the promotion of the public safety, peace and order.

See: State v. Stevens, 78 N.H. 268 (1916)
State v. Rheaume, 80 N.H. 319, 322 (1922)
Dederick v. Smith, 88 N.H. 63 (1936)

Part II, Art. 5 of the New Hampshire Constitution specifically confers upon the Legislature "full power and authority . . . to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions . . . as they may judge for the benefit and welfare of this state, and for the governing and ordering thereof . . . and the protection and preservation of the subjects thereof . . ."

In Dederick v. Smith, supra, at page 68 our Supreme Court said:

> "It is therefore established law in this jurisdiction that when the police power of the state is invoked by the legislature in the enactment of a statute for a proper purpose, such a statute will not be declared unconstitutional merely because it restricts some of the rights secured to individuals by the fundamental law. It will be declared invalid only when the restrictions thus imposed are found to be unreasonable . .
>
> "In passing upon the issue of reasonableness, the importance of the public benefit which the legislation seeks to promote is to be balanced against the seriousness of the restriction of private right sought to be imposed. If a statute is directed to a public interest of minor importance and yet imposes serious restriction upon guaranteed rights, the conclusion that it is unreasonable may be required. . . "

It is impossible to conclude that discrimination against citizens of this State for reasons of race, color, religious creed, ancestry, or national origin is of minor public interest. On the contrary, a direct connection with public security, protection and morals is apparent.

Cf: State v. Normand, 76 N.H. 541 (1913).

COPY

In Railroad Mail Association v. Corsi, 326 U.S. 88 (1944), the United States Supreme Court had before it section 43 of the New York civil rights law, prohibiting labor organizations from denying a person membership by reason of race, creed, color or national origin. Other sections of the same law contained civil and criminal sanctions and violations. The labor organization involved in this case contended that these sections violated the Due Process Clause of the 14th Amendment by interfering with its right to select its members and by abridging its property rights and liberty of contract. In affirming the constitutionality of the act the Court said, in part:

> "We have here a prohibition of discrimination in membership or union services on account of race, creed or color. A judicial determination that such legislation violated the Fourteenth Amendment would be a distortion of the policy manifested in that amendment which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race and color. We see no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed by an organization, functioning under the protection of the state which holds itself out to represent the general business needs of employees (pages 93-94)."

Senate Bill No. 8 is a broad statute. For example, it is considered probable that its definition of a place of public accommodation, resort, or amusement might even extend to include retail stores. Since it contains a severability clause which provides that if any provision, sentence, clause, section, or part thereof shall be held unconstitutional that it is the legislative intent that the act would have been adopted nevertheless, it is believed necessary to comment upon certain provisions of Senate Bill No. 8, as presently written, which require amendment.

Section 1 purports to prohibit the mailing of discriminatory literature. It is believed that private use of the U. S. mail, whether intended for addressees within or without the State of New Hampshire, is a matter of exclusive federal jurisdiction and it is therefore recommended that the provisions of Senate Bill No. 8 with regard to prohibited mailings be deleted and that there be substituted therefor a simple statement that nothing in the act shall be construed to prohibit the mailing to any person of a private communication in writing in response to his specific written inquiry.

See: U.S. Const., Art. I, Sec. 8 (7)
72 C.J.S., Post Office, Sec. 2, 21
In re: Jackson, 96 U.S. 727 (1878)

State of New Hampshire
OFFICE OF ATTORNEY-GENERAL

COPY

Section 3, II of the Act, page 5, lines 45 and 46, should read as follows:

"not be a bar to injunctive proceedings under this section, nor shall the institution. . ."

Some confusion appears at section 3, II, lines 31 - 42, in that the statute as presently written would appear to permit suspension of a license without discretion in the court and without a preliminary hearing. These lines might be amended to read as follows:

"Where the defendant is operating all or part of his place of public accommodation, resort or amusement pursuant to a license granted by the state or any authority, subdivision, or municipality thereof, the attorney general may include in his action a petition that the court direct the appropriate official to suspend the defendant's license for a period of not less than ten, nor more than thirty days, and if the court finds that it has been judicially determined that the defendant has violated this act on any prior occasion within the twelve-month period next preceding the commencement of the action, it shall, after notice and hearing, issue an order directing such suspension of the defendant's license. . . ."

There remain other collateral questions under this bill with relation to the exclusiveness of the remedy of forfeiture in an action sounding in tort (section 3, I) vis-a-vis slander, libel, assault and battery et al, and limitations of damages therein. Likewise, it is not readily apparent whether and in what manner anticipatory violation might be made out.

This opinion is entirely in response to the request of your Committee. It is not and should not be construed as an endorsement of Senate Bill No. 8, as to which I have merely endeavored to cover inadequacies which are felt to affect its legality.

Respectfully,

Louis C. Wyman
Attorney General

W/d